

the number of rubber bales the net could safely carry at any one time, particularly as the loading operation was a continuous operation lasting over a period of some seven to eight hours. Further, and this to my mind is crucial, a safe system would have ensured that workers in the course of the operation would not find themselves under a raised net of rubber bales. The plaintiff's unchallenged evidence on this reads, "The net was lifted, the jib had moved four feet when the net burst. The 10 bales fell on the ground. The net was about 12 feet from the ground. One bale bounced on the ground and hit me." There is no finding on this aspect of the case by the learned trial judge. My view of the matter is, as often happens, persons in charge of repetitive operations become careless and so fail to see that a safe system of work is maintained.

For the reasons set out above I held the 2nd defendants negligent and therefore also liable to the plaintiff. I apportioned liability as between the two defendants on an equal basis and entered judgment accordingly.

Order accordingly.

Solicitors: *Goh & Hin; Murphy & Dunbar; Battenberg & Talma.*

A MALAYSIAN REPORTS

PONNUKON v. JEBARATNAM

[F.C. (Raja Azlan Shah C.J. (Malaya), Salleh Abas F.J. & Abdoolcader J.) July 9, 1979]

[Ipoh — Federal Court Civil Appeal No. 32 of 1978]

B *Partnership — Partnership in land development — Whether extends to ownership of land — Separate property of partner.*

C The appellant had obtained an option to sell land for \$60,000. The appellant found difficulties in getting a buyer and he formed a partnership with the respondent to develop the land into a housing estate. Efforts were made to obtain a loan from a bank to buy the land but these efforts were not successful. Subsequently the respondent bought the land with his own money and money he borrowed from his relatives and the bank. The appellant brought an action to seek a declaration that the land was held in trust for the partnership between him and the respondent. The learned trial judge dismissed the action and the appellant appealed.

D **Held:** (1) there was no agreement at all between the parties that the land was to be purchased or treated as partnership property;

(2) the object of the firm being land development it did not necessarily mean that the land must be owned by the firm in order to carry on with the business and no such term could be implied from the evidence;

(3) the land was not paid for with the funds of the partnership but with funds raised by the respondent on his own separate act independently of the appellant or of the partnership;

E (4) the learned trial judge was therefore right in holding that the land was the separate property of the respondent and not a joint ownership of the partnership.

Cases referred to:-

- (1) *Gian Singh v. Devraj Nahar & Anor.* [1965] 1 W.L.R. 412; [1965] 2 M.L.J. 12.
- F (2) *Re Johns' Assignment Trusts, Niven and Niven* [1970] 1 W.L.R. 955.
- (3) *Smith v. Watson* 2 B. & C. 401; 107 E.R. 434.
- (4) *Miles v. Clark* [1953] 1 W.L.R. 537.
- (5) *Ratna Ammal & Anor. v. Tan Chow Soo* [1964] M.L.J. 399.

FEDERAL COURT.

G A. Jayadeva (S.N. Leow with him) for the appellant.

V.K. Palasunthram (S.M. Ratnam with him) for the respondent.

Cur. Adv. Vult.

H **Salleh Abas F.J.** (delivering the judgment of the Court): For the purpose of our judgment in this appeal, the facts may be briefly stated as follows.

I On July 3, 1969 one Mrs. J. Devadason representing the vendor of the land in question, gave to the appellant an option to sell it for \$60,000 at \$1,200 per acre. A commission of 2% would be paid to the appellant, and if he could sell at a higher price, in addition to the commission he would be entitled to keep the difference. The option was valid for one year and therefore should expire on July 3, 1970. Because of the nature and situation of the land, the appellant found difficulties in getting a buyer despite his numerous attempts to get one. This is clearly borne out in his letter dated March 1, 1971 to Mr. Ernest V. Devadason, the lawyer son of the vendor. The

appellant then met the respondent and they both decided to form a partnership to develop the land into a housing estate. Presumably, pursuant to this understanding, on November 23, 1970 they opened a joint account in the Langkap branch of Southern Bank and on the following day, i.e. November 24, 1970, they submitted a joint application for a loan of \$60,000 to the said bank for the purpose of buying the land in question. They even authorised the bank to hire an appraiser to value the land and to debit their joint account with the fees. Finally, on January 15, 1971 they registered their partnership under the name of Ratnam & Kon, whose business is stated to be as "Estate and Land Development, Mining and Commission Agent". Their application for loan to the Southern Bank was not successful. In the meantime, the option which was to expire on July 3, 1970 was extended on application by the appellant several times. It was extended to March 4, 1971, then to July 7, 1971 and finally to July 31, 1971. However, on July 29, 1971, i.e. two days before the expiration of the last extension, the option was exercised. Both the appellant and the respondent went to the office of the solicitors, Messrs. Gibb and Company. On the same date Mr. Balasingam of Messrs. Gibb and Company, acting on behalf of the appellant, notified Mr. Ernest V. Devadason, a solicitor, acting for his mother, in a letter stating that the appellant had found a purchaser and that the option was then exercised. Subsequently, on October 7, 1971, a sale agreement was entered into between the respondent and Mrs. S. Devadason representing the vendor. The price was \$65,000. The 10% deposit amounting to \$6,500 was paid by the respondent and the balance of the purchase price was not paid until July 3, 1972, when the transaction was completed and the land transferred into the respondent's name. To pay for the land the respondent obtained contributions of \$6,500 from his son and \$15,000 from his nephew, and for the rest he raised a loan from the Chartered Bank.

After the option was exercised, Messrs. Gibb and Company on August 10, 1971 wrote on behalf of the appellant to Mr. Ernest V. Devadason claiming a 2% brokerage commission due to the appellant. This claim was rejected by Mr. Ernest V. Devadason in his letter of August 13, 1971. After this, nothing was heard of the appellant until another solicitor acting on his behalf on August 4, 1972 wrote to the respondent accusing him of committing a breach of trust and defrauding the appellant because by his unilateral action he had abused the appellant's option and thus deprived him of all commission and prospective profits. This allegation triggered subsequent correspondence between the appellant's new solicitor and the respondent's solicitor. In the meantime, the appellant also lodged a caveat against the land and finally on September 6, 1972 commenced a civil suit, the subject matter of the present appeal. In his original statement of claim the appellant prayed for a declaration that the land in question is held by the respondent on trust for the appellant's own benefits, but in his amended statement of claim he asked for a declaration that the land is held on trust for the benefits of a partnership between him and the respondent.

Counsel for the respondent, whilst admitting that there was a partnership, contended that the partnership is merely in land development and does not extend to the ownership of the land so as to make it a partnership property. Mr. Justice Hashim Yeop A. Sani in a very carefully considered judgment, agreed with the respondent's counsel's submission and therefore dismissed the appellant's suit with costs. The appeal before us is merely based on facts and we see no reason to disagree with the learned judge. The only point worth considering is the question whether the learned judge was right in holding that the land is a separate property of the respondent and not a joint ownership of the partnership.

The law regarding partnership property may be stated as follows. The question whether a property is that of a partnership or a separate property of the respondent only depends upon whether there is an agreement (*Lindley on Partnership* (1971) 13th Ed. page 349) amongst the partners, express or implied, touching such property. In the absence of any such agreement, the question has to be resolved upon whether there is an intention of the partners to treat the property as a partnership property. If no such intention can be inferred, the property is the separate property of a partner although it may be used for, or even essential to, the partnership business and the partnership may even be debited with the outgoings and expenses of the property. (*Gian Singh v. Devraj Nahar & Anor.*⁽¹⁾ and *Re John's Assignment Trusts, Niven and Niven*⁽²⁾). Intention to treat the property as partnership property will be presumed whenever the property is purchased with partnership money, although it may have been purchased by or in the name of a partner only. This presumption, however, will be rebutted if it is proved that the money used for the purchase was in fact not belonging to the partnership, as for example, the money was lent to the partner; in such event the property is not a partnership property. Thus the question as to who pays for the property is important. The mere use of the property for the purpose of partnership without any evidence that the property was purchased with partnership fund, nor evidence as to the intention to treat the property as such, will not change the ownership of the property from separate to partnership property. Further, partners may agree to the division and sharing of profits, but the property used to produce the profits do not necessarily become the property of the partnership. So where a merchant employs a broker to buy goods for him and to sell them again on his account, although it may be agreed that the profits are to be divided, the goods themselves and the money arising from the sale are the property of the merchant and not a joint property of himself and the broker (*Smith v. Watson*⁽³⁾). Similarly, where there is no agreement between the partner as to ownership of the property used in the partnership, the court will not infer an agreement except one which is absolutely necessary to give business efficacy to that which has happened (*Miles v. Clarke*⁽⁴⁾). In the final analysis, the question of separate and joint property in a partnership must eventually be resolved on the facts of each individual case (*Ratna Animal & Anor. v. Tan Chow Soo*⁽⁵⁾).

Applying the principles stated above, the first question to be determined is whether there was an agreement between the appellant and the respondent that the land in question should be a partnership property or at least to treat the land as such. We see no reason to differ from the finding of the learned judge that there was no such agreement and that the agreement between them, if there was any, did not go all that far, but was merely to form a joint venture business in land development and to share any profits derived from such business.

The appellant's assertion that the land is a partnership property completely runs counter to his own evidence. Throughout his testimony never once did he say that the land was intended to be and should be treated as a partnership property. On the contrary, he insisted that he and not the respondent was to be the purchaser. He thus said that he was to buy the land, build houses on it and sell them. He was supposed to buy it with a loan which he and the respondent applied to Southern Bank. Referring to the nature of partnership between him and the respondent, he said that the partnership was to build houses and shops for sale and to share profits in the ratio of 3 to himself and 1 to the respondent and later modified virtually to half and half. He took the respondent into partnership because he and the respondent are good friends. There is thus nothing in his own evidence which goes on to show that the land was intended or to be treated as a partnership property. Again, referring to the exercise of the option on July 29, 1971 when both he and the respondent went to the office of Messrs. Gibb and Company, the appellant said that he instructed them to complete the sale and that he was to be the purchaser. This testimony, to which we shall revert in the later part of our judgment, is completely contrary to the evidence of Mr. Balasingam (DW2), the solicitor in Messrs. Gibb and Company, and to the letter which he (Mr. Balasingam) wrote on July 29, 1971 to Mr. Ernest V. Devadason notifying the latter of the appellant's exercise of the option. He even maintained that he informed Mr. Ernest V. Devadason that he was the intended purchaser and not a broker. It is not surprising therefore that these assertions, in view of the evidence of several witnesses called by the respondent, did not find favour with the learned judge. Even if they were believed, they only go to show that the land was to be purchased by him and no more; and under no stretch of imagination can they amount to an agreement that the land in question was intended to be a partnership property. Further, in his new solicitor's letter to the respondent dated August 4, 1972 in which he complained of loss of commission and prospective profits, neither did he assert that the land was a partnership property. But instead he maintained that he was to purchase the said property himself. In our judgment, his claim that the land is a partnership land is therefore one which is completely without any foundation.

To bolster up his claim that he had an interest in the land, he maintained in his evidence that he had incurred the following expenses —

- (1) processing charges for loan application to Southern Bank for \$500;

- A (2) rental for the partnership office at No. 30, Main Road, Langkap, at \$85 per month;
- (3) valuer's fee of \$400;
- (4) construction of a bund on the land for \$17,000.

His evidence on these expenses is patently lying and the learned judge was right in rejecting it. As to the loan processing charges of \$500, this was paid by the respondent who produced his cheque butt for the amount (Exhibit D10). As to the rental of the partnership office, the landlord Teoh Eng Soon (DW5) said that the respondent and not the appellant was the tenant and that the rental was paid for by the respondent. Regarding the valuation fee, the valuer Chew Peng Loon (DW3) said that the valuation report was prepared on the instruction of the respondent and that the fee was paid by him. Regarding the cost of bund construction, this was constructed after the land was sold to the respondent and the contractor Ooi Chia Choon (DW6) said that he constructed the bund on the instruction of the respondent and that he charged \$17,000 for the work and that this was paid by the respondent. Receipts (D8) for the payment are in the name of the respondent. Not only that every one of these allegations is contradicted, the very food which the appellant ate for his sustenance during the period in 1970-1971 was proved by the evidence of Sundram s/o Pillay (DW3) to have been paid for by the respondent. Such was the financial position of the appellant. Yet he claimed that he was to be the purchaser and to build the houses and shops for sale and that he had spent various sums in connection with the land and that he took the respondent into a partnership only as an act of generosity based on friendship. Such a fantastic claim cannot stand in the face of evidence.

F In any case, the appellant never even as much as conceded that these expenses were incurred on behalf of or for the purpose of partnership. However, even if they were so incurred, despite being contrary to the appellant's assertion and to the fact that the respondent paid for them, in our judgment, in the absence of any other circumstances, the fact of these expenses cannot convert the land purchased by the respondent in his name and with his money to be a partnership property. Such expenses are merely incurred in the course of or in connection with the business of land development without necessarily touching upon the ownership of the land. The efficacy of "Estate and Land Development" business of Ratnam & Kon will not be affected by the fact that the land belongs to the respondent. Such business can effectively go on without the land belonging to the partnership. Just as the fact in *Miles v. Clarke*⁽⁴⁾ that a photographer who has allowed his equipments to be used in the cause of the photography partnership, and in *Smith v. Watson*⁽³⁾ that the goods purchased and sold by a broker on behalf of a merchant who agreed to share profits from the venture with the broker does not convert the photographic equipments and the goods into joint ownership, similarly the land purchased by the respondent in his name and with moneys raised by him independently of the appellant will not make the land a partnership property, even though the land may be necessary for the business of land development. We therefore agree with the learned judge that such

business does not mean that the land in question became a partnership property.

The appellant denied that the understanding between him and the respondent was that the latter was to purchase the land and that both of them were to jointly develop it and to share profits derived from the venture. He maintained that he was to buy the land and to develop it, taking the respondent as his partner only as an act of generosity on his part based on friendship. He asserted that he did not know that the respondent purchased the land in his name, nor was he aware that the respondent raised a separate loan to pay for the land. This evidence is in conflict with that of the respondent, who testified that when the appellant came to see him with the option, he told the appellant that he wanted to buy the land, and so he tried to raise the loan but did not succeed. As a result, the firm of Ratnam & Kon at the suggestion of the appellant was formed as a prelude to a joint venture in land development. A loan from the Southern Bank was applied for in order to purchase the land. As the loan application was not successful, he considered the joint venture as at an end, and told the appellant that there was no point of proceeding any further with the partnership. So with the concurrence and knowledge of the appellant, the respondent on his own efforts raised another loan from Chartered Bank and also obtained contributions from his son and nephew. The learned judge accepted the respondent's evidence and we see no reason to disagree with him. Had the land been purchased and paid for with the loan given by Southern Bank, the case would have been different. In that event, since the partnership money were used to purchase it, the land would have been a joint ownership though it might be purchased by or in the name of one of the partners only. But such is not the case. As the loan from Southern Bank was not forthcoming, and the respondent raised money elsewhere on his own independent efforts without involving the appellant or the firm in any liability and such efforts were agreed to by the appellant, the inevitable conclusion is that the partnership to purchase the land, if there was one, was completely abandoned and the property so purchased does not belong to the partnership, but to the respondent as his separate property. Further, there is no evidence to show that the loan which the respondent raised from the Chartered Bank will make the appellant in any way liable to the Bank as partner. The appellant's assertion that the land is his and later a partnership land, if accepted, means that he acquires an interest in the land without even having to pay for it. Just because he and the respondent are partners in Ratnam & Kon, the land which the respondent purchased with his money and in his name must be the property of the partnership. Such an assertion, in our view, runs counter not only to law but also to common sense. We therefore reject it.

As to the exercise of the option on July 29, 1971, Mr. Balasingam, an advocate and solicitor (DW2) of Messrs. Gibb and Company, said that the appellant as an option holder asked him to exercise the option and that the purchaser was the respondent, and so he wrote a letter to that effect notifying Mr. Ernest V. Deva-

dason of the exercise of the option. In his letter Mr. Balasingam wrote —

"Our client has now instructed us that he exercises the option as he has now found a purchaser and we hereby give you notice that our client exercises the option."

On August 10 he wrote another letter asking for 2% brokerage commission on behalf of the appellant. Mr. Balasingam also testified that he never knew that the two were partners as none had told him so. In contrast to Mr. Balasingam's testimony, we have adverted to the evidence of the appellant on this point. He alleged that he instructed Mr. Balasingam that he was to be the purchaser and not a broker, and he even denied that he had asked Mr. Balasingam to write for a brokerage commission. In view of such a serious allegation cast on the solicitor for acting contrary to instruction, we expected Mr. Balasingam to be cross-examined on this point. As he was never cross-examined at all on this, it appears that the appellant is not a sort of witness who is very careful with the truth and untruth of his evidence. He is inclined to say anything as long as it appears to support his case, regardless of truth. It is not surprising, therefore, that the learned judge rejected his evidence and accepted the evidence of Mr. Balasingam. What all these facts amount to are therefore this, that the appellant was nothing but a broker or an agent for the vendor, as he had always been held and understood by the vendor, and at the most a double agent who was also acting for the purchaser.

It must be remembered that the option he obtained is not one to buy but to sell. He therefore had to find a buyer. In his evidence, he admitted that he was a broker, but went on to assert that he was not looking for a buyer and that despite the fact that the option lapsed several times he was in no hurry because he wanted the land to appreciate in value. This evidence is completely contrary to his own letter which he wrote on March 1, 1971 to Mr. Ernest V. Devadason stating that he had difficulties in finding a buyer because of the nature and location of the land. Even if his assertion of not looking for a buyer were accepted, it simply means that the appellant must have been lying to the vendor every time he asked for an extension of the option. This clearly shows that he is not the sort of person to be trusted with responsibility for he would do the very opposite of what he was expected to do.

That the appellant was never intended to be a purchaser is borne out by the evidence of Mr. Ernest V. Devadason. He said that the appellant had told him that he had found a buyer who wanted to remain anonymous and so asked him (Mr. Devadason) to prepare a sale agreement with the appellant as purchaser or his nominee or nominees. As the appellant did not pay the required deposit, the arrangement was dropped and proceeded no further. This evidence clearly shows that in the face of expiry of the option, the appellant was desperate to look for a buyer and as a ground to have an extension of the option he told Mr. Ernest V. Devadason that he had a buyer who preferred to remain anonymous. He never told Mr. Ernest V. Devadason that he was going to be the purchaser. As far as Mr. Ernest V. Devadason was con-

cerned, the appellant was all along an agent, and he even wrote a letter on March 22, 1971 to the appellant to make it clear to him that he was nothing more than an agent and a broker.

The review of evidence in this case leads us to an inevitable conclusion that the appellant who obtained an option to sell the land was an agent of the vendor, whose duty was to look for a buyer. As he had difficulties in getting one, he kept on asking for extensions of the option until it was finally exercised. At one stage before it was exercised, he and the respondent had formed a partnership to buy the land and to develop it into a housing estate; but as the loan which they both applied for was not forthcoming, the partnership was abandoned and the land with the knowledge and concurrence of the appellant was finally sold to the respondent who paid for it from funds which he on his own efforts raised without involving the appellant in any financial or legal liability. After the option was exercised on July 29, 1971, he asked for a brokerage commission from the vendor, but the claim was rejected by Mr. Ernest V. Devadason, solicitors for the vendor. As a result, he wrote a letter to the respondent alleging that the latter's unilateral action had deprived him of his commission and profits and meanwhile lodged a caveat against the land and subsequently commenced the present suit, at first claiming that the land is held by the respondent on trust in his favour, and later, on trust for the partnership as a partnership property. We hold that there is no merit in this suit because —

- (1) there was no agreement at all between the parties that the land was to be purchased or treated as a partnership property;
- (2) the object of the firm being land development does not necessarily mean that the land must be owned by the firm in order to carry on with the business and no such term could be implied from the evidence;
- (3) the land was not paid for with the funds of the partnership but the funds raised by the respondent on his own separate act independently of the appellant or of the partnership.

We therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: Jayadeva & Kamal; S.M. Ratnam.

A HAJI EMBONG BIN IBRAHIM & ORS. v. TENGKU NIK MAIMUNAH HAJJAH BINTE ALMARHUM SULTAN ZAINAL ABIDIN & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.J.J.) September 1, 1979]

[Kota Bharu — Federal Court Civil Appeal No. 68 of 1975]

B Islamic Law — Wakaf Khas — Validity of — Islamic Wakaf Validating Enactment Act, 1972 — Trengganu Administration of Islamic Law Enactment, 1955, s. 61.

In this case the first respondent on June 13, 1961 made a document purporting to be a *wakaf* by which she made a number of dispositions in favour of her relatives and other persons with an ultimate disposition to various religious and charitable objects. Subsequently she wrote to the Commissioner of Religious Affairs, Trengganu, to revoke the *wakaf*. She also executed a document purporting to surrender her share in the Chenderong Concession to the second respondent. She then brought a suit seeking a declaration that the said purported *wakaf* was void. Harun J. in the High Court [1979] 1 M.L.J. 257 held that the *wakaf* was valid but only to the extent of one-third of the *wakaf* property. Three of the beneficiaries appealed against the decision claiming that the *wakaf* was wholly valid and that the one-third limitation only applied to a *wakaf* made by will or during death illness. The respondents on the other hand lodged a cross-appeal contending that the *wakaf* was wholly invalid.

Held, allowing the appeal: (1) the Islamic *Wakaf Validating Enactment*, 1972, has retrospective effect and applies to the *wakaf* in the present case;

(2) the *wakaf* in this case was valid as (i) it dealt not only with the income or profits from the Chenderong Concession but also the very land itself (ii) the dispositions to strangers were valid under Islamic Law and were saved by sections 2(3) of the Enactment;

(3) the one-third limitation contained in section 61 of the Administration of Islamic Law Enactment, 1955 being confined only to *wakaf* or *nazar* made by way of will and death-bed gift, has no application to the *wakaf* in the present case.

Cases referred to:-

- F** (1) *Commissioner of Religious Affairs v. Tengku Mariam* [1969] 1 M.L.J. 110; [1970] 1 M.L.J. 222.
- (2) *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhury* (1894) 22 I.A. 76; I.L.R. 22 Cal. 619.
- (3) *Fatumah v. Mohamed bin Salim* [1952] A.C. 1.
- (4) *Mohamed Ahsanullah Chowdhry v. Amarchand Kundu* (1889) 17 I.A. 28; I.L.R. Cal. 498.
- G** (5) *Ismail Haji Arat v. Umar Abdulla & Anor.* A.I.R. 1942 Bom. 155.
- (6) *Hashim Ali v. Iffat Ara Hamidi Begum* (1942) 46 Cal. W.N. 561.
- (7) *Mt. Akhtar Banu Begum v. Kanhaiya Lal* A.I.R. 1941 Oudh 492.
- (8) *Abdul Wahab v. Sughra Begum* A.I.R. 1932 All 248.
- (9) *Abdul Mabud Khan & Ors. v. Nawazish Ali Khan* A.I.R. 1925 Oudh 301.
- H** (10) *Mt. Musharraf Begum & Ors. v. Mt. Sikandar Jehan Begum* A.I.R. 1928 All 516.

FEDERAL COURT.

S.T. Chung (Joseph Tan with him) for the appellants.

Miss Chen Kah Leng for the respondent.

I *Cur. Adv. Vult.*

Salleh Abas F.J. (delivering the judgment of the Court): This is an appeal and a cross-appeal against the decision of Harun J. on the validity of a document purported to be a *wakaf* declared by the first plaintiff on June 13, 1961. The facts of the case may be stated as follows.